Supreme Court, U. S.
FILED
JUL 8 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-1580

In the Matter of the Application of

SANDS POINT NURSING HOME,

Petitioner,

-against-

HOLLIS S. INGRAHAM, as Commissioner of Health of the State of New York and RICHARD L. DUNHAM, as Budget Director of the State of New York,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

REPLY BRIEF FOR PETITIONER

STANLEY H. LOWELL
LOWELL & KARASSIK
Attorneys for Petitioner
99 Park Avenue
New York, New York 10016
(212) 867-9595

STANLEY H. LOWELL
Of Counsel

(9191) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201)257-6850 | New York, N.Y. (212) 840-9494 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Page

A. Respondents' Point I in support of denying certiorari.. 1

1. The regulations controlled petitioner's reimbursement 2

2. Petitioner had a right to rely on past practice ... 4

3. Health Department approval did bind the Commissioner 5

B. As to respondents' Point II 6

C. Respondents' Point III 7

Conclusion 9

Appendix A ..... Ia

TABLE OF CITATIONS

Cases Cited:

Arizona Grocery Co. v. Atchison Topeka & Santa Fe Ry. Co., 248 U.S. 370 4

Etor v. City of Tacoma, 228 U.S. 148 3

F. Uri v. Bowles, 152 F.2d 713 (9th Cir. 1964) 4

Jacoby v. McNamara, 83 N.Y.S. 2d 763, aff'd., 275 A.D. 695 N.Y.S. (870) 2d 431 3

Larionoff v. United States, 553 F.2d 1176 (1976 C.C.A., D.C.), cert. granted, 50 L. Ed. 2d 607, 97 S. Ct. 522 ... 3

Contents

	Page
Lynch v. United States, 292 U.S. 571	3
Matter of Bayswater v. Karaghuezoff, 37 N.Y.2d 408	3
O'Brien v. Delaney, 255 A.D. 385, 7 N.Y.S. 2d 596, aff'd., 280 N.Y. 697, 21 N.E. 2d 202	3
People ex rel. Doscher v. Sisson, 222 N.Y. 387, 118 N.E. 789	3
People ex rel. Jordan v. Martin, 152 N.Y. 311, 46 N.E. 485	3
Poss v. Kern, 263 A.D. 320, 32 N.Y.S. 2d 979	3
Walsh v. Planning Board of Eastchester, 138 N.Y.S. 2d 362	3

Statutes Cited:

42 U.S.C. §1395	2
42 U.S.C. §1396	4, 7
42 U.S.C. §1396a	5
10 NYCRR §86	7
10 NYCRR §§86.21, 86.24, 86.29 and 86.32	8
10 NYCRR §730.2(1)	2
10 NYCRR §730.2(g)	2

Contents

	Page
United States Constitution Cited:	
Art. VI, Cl. 2, U.S. Const.	5
Other Authorities Cited:	
1 N.Y. Jur. Section 109, p. 461	3
Public Health Law §§12, 12-b, 20-b	2
Public Health Law §§2801(1), (4), 2802(2), 2802(3)(d)	5
Public Health Law §§2803, 2807	3
Article 4, Section 8, New York State Const.	3

In The

Supreme Court of the United States

October Term, 1976

76-1580

In the Mater of the Application of

SANDS POINT NURSING HOME,

Petitioner,

-against-

HOLLIS S. INGRAHAM, as Commissioner of Health of the State of New York and RICHARD L. DUNHAM, as Budget Director of the State of New York,

Respondents.

On Petition For a Writ of Certiorari to the Court of Appeals of the State of New York

PETITIONERS' REPLY BRIEF

A. RESPONDENTS' POINT I IN SUPPORT OF DENYING CERTIORARI

Respondents argue that: (1) no statute or regulation required the Commissioner to use purchase price as the basis for determining property cost reimbursements (R.6);[1] (2) Petitioner had no right to rely upon past practices of the Commissioner in applying and interpreting the reimbursement regulations, but should have anticipated that respondents would have applied

1. References to the letter "R" followed by a number(s) refer to page(s) in respondents' brief.

Medicare principles of reimbursement (Title XVIII, Social Security Act, 42 U.S.C. §1395, *et seq.*) to Medicaid reimbursement (R.7, 8); (3) Public Health Council approval of the proposed sale did not restrict the Commissioner in his rate setting function (R.8, 9). Each contention is without merit.

1. The Regulations Controlled Petitioner's Reimbursement

The reimbursement regulations of the State were submitted to and incorporated verbatim into the State Plan approved by HEW for determining Medicaid reimbursement on a prospective basis. The decision of the Court of Appeals in *Sigety v. Ingraham* (P.3a-8a)[2] made clear that New York had devised a system of Medicaid reimbursement pursuant to which prospective rates would be calculated. The methodology was contained in promulgated regulations applicable to all. State statutes did not provide for or permit an individual determination of a rate. If the regulations so promulgated were reasonable, the result would not be disturbed even if hardship resulted to one facility, and another prospered under the methodology. However, as the decision made clear, it involved a period when Medicaid participation was *voluntary* for the facility. Subsequent to the rate year referred to in *Sigety*, and prior to the transaction which is the subject of this petition, the Health Department adopted 10 NYCRR §730.2(1) (P.31a) which made participation in the Medicaid program *mandatory*. This regulation coupled with the prohibition against supplementation of Medicaid reimbursement, 10 NYCRR §730.2(g) (P.30a), compelled petitioner, a private enterprise, to carry on a public purpose. Accordingly, as petitioner could refuse Medicaid patients only at the risk of civil and criminal sanctions (Public Health Law §§12, 12-b, 20-b [P.18a-19a]) it had a constitutionally protected and vested interest in receiving reimbursement in accordance with the regulations, and was entitled to protection against an arbitrary administrative act in

2. References to the letter "P" followed by a number(s) refer to the page(s) in the petition to this Court.

applying prospective regulations retroactively and selectively to petitioner only. By such action, without legislative authority, petitioner was placed in the position of rendering public services at substantially less than its contractually fixed costs. By reason of the foregoing petitioner's property was taken without due process of law. *Lynch v. United States*, 292 U.S. 571, 577, 579; *Etor v. City of Tacoma*, 228 U.S. 148; *Matter of Bayswater v. Karaghuezoff*, 37 N.Y.2d 408; *Larionoff v. United States*, 553 F.2d 1176 (1976 C.C.A., D.C.), *cert. granted*, 50 L. Ed. 2d 607, 97 S. Ct. 522.

Petitioner had no advance notice by reason of the Public Health Law §§2803, 2807 (P.23a-26a), the relevant regulations (P.27a-29a) or case law (*Sigety v. Ingraham*) that an individual facility could be denied reimbursement under the regulations as applied consistently until then by the Commissioner. Indeed, any such suggestion would have been contrary to the language of the later amended regulations and the intent of Article 4, Section 8, New York State Const. (P.16a). It would have contravened a long line of State decisions that regulations are binding on administrators until lawfully changed. *O'Brien v. Delaney*, 255 A.D. 385, 7 N.Y.S. 2d 596, *aff'd.*, 280 N.Y. 697, 21 N.E. 2d 202; *Walsh v. Planning Board of Eastchester*, 138 N.Y.S. 2d 362; *Jacoby v. McNamara*, 83 N.Y.S. 2d 763, *aff'd.*, 275 A.D. 695, N.Y.S. (870) 2d 431; *People ex rel. Jordan v. Martin*, 152 N.Y. 311, 46 N.E. 485. The promulgated regulations had the force of law, *People ex rel. Doscher v. Sisson*, 222 N.Y. 387, 118 N.E. 789; *Poss v. Kern*, 263 A.D. 320, 32 N.Y.S. 2d 979. "An administrative agency may not ignore a regulation of its own which has the full force of law." 1 N.Y. Jur. Section 109, p. 461.

While *Sigety v. Ingraham* suggested that the appellant therein would have had just cause to complain to perform a public service (take all Medicaid patients) below actual fixed costs, the Court of Appeals failed to provide relief when petitioner herein noted that it was in exactly such a position, so that its property rights were involved.

Respondents do not contest that they had always used the approved sales price as the basis of reimbursement and continue to do so with regard to all facilities which were acquired prior to the change in the regulations, with the one exception of petitioner. Nothing in 42 U.S.C. §1396, *et seq.*, or the Federal Medicaid regulations then or thereafter suggest that the provisions of the approved State Plan for Medicaid which detailed the reimbursement methodology, could be abandoned and different principles from a distinct Federal program (Medicare) applied retroactively to produce a different result. Where reservation of the right to change a rate computed in accordance with the regulations *is not* set forth in a Federal statute or regulation, or in any judicial interpretation of legislation, Federal case law has barred the action complained of. *Arizona Grocery Co. v. Atchison Topeka & Santa Fe Ry. Co.*, 248 U.S. 370; *F. Uri v. Bowles*, 152 F.2d 713 (9th Cir. 1964). As the Commissioner had uniformly acted by applying the federally approved regulations in this Federal grant-in-aid program, and using approved property cost incurred in a *bona fide*, arms-length, fully disclosed transaction as the basis of reimbursement, and since such interpretation is fully consistent with the published regulations, petitioner submits that the Commissioner was required according to both Federal and State law to use the purchase price approved by the Health Department. He had no statutory or regulatory authority to do otherwise.

2. Petitioner Had A Right To Rely On Past Practice

Respondents do not contest and apparently concede that the Commissioner departed only in this one instance, from his consistent practice of using approved cost as the basis for reimbursement in the rate. The record on appeal to the Court of Appeals sets forth two transactions preceding the instant matter, where *conditional* contracts as herein to transfer real property[3]

3. The contract of sale filed with the Department of Health herein specifically conditioned purchaser's obligation to buy on *approval* of the contract by the Department.

were disapproved by the Health Department determination that the sales price was too high. Thus, when the Health Department approved the transaction, petitioner had every right to anticipate that it would be reimbursed in accordance with the regulations and practice of the Department, as applied to all other facilities similarly situated.

Respondents argument that petitioner should have anticipated that Medicare principles of reimbursement would apply is totally specious. Even the State courts rejected this position. Petitioner had a right to anticipate that the Commissioner would apply reimbursement principles contained in the State Plan for Medicaid approved by the United States Department of Health, Education and Welfare, 42 U.S.C. §1396a as mandated, Art. VI, Cl. 2, U.S. Const.

3. Health Department Approval Did Bind The Commissioner

Respondents brief seeks to convey the impression that the Commissioner's first opportunity to avoid the reimbursement impact of the sale was at the time he was required to fix petitioner's Medicaid rate (R.4, 6, 8). The record to the Court of Appeals reflects the fact that the Commissioner through his responsible employees served as the staff of the Public Health Council. They joined in the approval of the proposed sale, and raised no objection that it would have an adverse impact on reimbursement. In fact, Public Health Law §§2801(1), (4), 2802(2) (P.19a-23a) required the Commissioner to participate in the decision whether or not to approve the transfer of the property. Had the Commissioner withheld his approval or objected to the transfer, the conditional sale would not have taken place. In disapproving reimbursement the Commissioner was acting contrary to his own approval.[4]

4. §2802(3)(d) requires the Commissioner to consider the "adequacy of financial resources and sources of future revenue." The full subdivision is set forth at page 1a of Appendix A.

Since the Commissioner had a statutory role in the approval of the proposed sale, independent of the Public Health Council, and his staff provided the recommendations upon which the Public Health Council acted, *United States v. R.C.A.* cited by respondent (R.9) is not relevant.

Matter of 225 E. 70th St. Corp. v. Weaver (R.9) is not relevant since petitioner has not received other compensation or benefits that would offset its fixed annual loss of $140,000 over the life of the mortgage.

B. AS TO RESPONDENTS' POINT II

Respondents urge that the "decisions of the courts below were supported by ample precedent and well within the requirements of the Federal Law." (R.10). For the reasons set forth above such is not the case. The action was unexpected and contrary to all precedent.

Respondents urge that the petitioner has failed to demonstrate any denial of rights protected by the Federal Constitution (R.10). This is not so. Petitioner submits that it has been denied due process of law, and equal treatment under the law.

Respondents' reliance on *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.* (R.10) is misplaced. In *Great Northern* the State's highest court had overruled a prior decision which had permitted a shipper to recapture a common carrier's excessive charges. The question was whether the State Court's new interpretation of the statute must be given retroactive effect to relieve a carrier from burdens imposed by the State Court's erroneous prior interpretation of the statute. Justice Brandeis held that the Federal constitution did not mandate a retroactive application of the new ruling barring recapture, since the carrier and customer (like petitioner herein) had bargained under the preexisting interpretation of State Law. In distinguishing

Arizona Grocery Co. v. Atchison, the Court noted that the ICC rate in *Arizona* was not a provisional rate and accordingly the Federal statute did not permit a recapture of any excess charges. Similarly, the Federally approved State Plan covering reimbursement did not provide for provisional rates. The State Plan set forth specific State reimbursement regulations pursuant to which a *prospective* rate was to be calculated. There can be no serious contention that rates calculated in accordance with the Federally approved reimbursement methodology were to be provisional. The amended regulations two months after the sale took place and the petitioner's costs were fixed, were by their very terms to be applied to all transactions subsequent to the instant matter. While it is true that *Arizona* was disposed of through statutory interpretations, it is nevertheless clear from a reading of that case and *Great Northern* that a statute or regulation may not be given a retroactive application contrary to its terms to divest a person of substantial vested property rights.

Contrary to respondents' contention (R.11) nothing in *Sigety* or in any other judicial or statutory authority suggests that at the time of the approved sale, and the closing of title of June 29, 1971 the detailed reimbursement regulations 10 NYCRR §86 incorporated in the approved State Plan were an experiment entitling the Commissioner to withhold constitutionally an statutorily secured rights. While the Medicaid Act 42 U.S.C. §1396 *et seq.* authorized the State to develop a plan for reimbusement, it did not confer a license upon the State to refuse to follow its own Federally approved Plan and to breach fundamental protections secured by the United States Constitution. Moreover, it is manifestly unfair to take petitioner's property as suggested by respondents (R.11), because the State allegedly has chosen to "experiment".

C. RESPONDENTS' POINT III

Respondents apparently concede that petitioner was singled out for unique treatment (R.11), despite the fact that

respondents could have disapproved the proposed sale, as was their right, and as they had done in prior transactions. In such event there would not have been a closing. It is uncontested that petitioners' entire transaction was at arms-length, *bona fide* and fully disclosed. Surely, equity and justice require that the arbitrary taking of petitioners' property by respondents be rejected.

Respondents admit that the regulations which were applicable to the instant situation were changed by the respondents in August, 1971, a little over one month *after* the facility was purchased by the petitioners. Thus, respondents concede that the regulations in question 10 NYCRR §§86.21, 86.24, 86.29 and 86.32, were all mandated subsequent to the approval of the conditional contract by the Public Health Council on June 8, 1971 and the passage of title pursuant to the contract of sale on June 29, 1971.

Respondents demonstrate the weakness of its position by stressing the fact that petitioner alone has been singled out. Respondents urge on this Court that the particular facts of this case are not likely to recur. Petitioner submits that the unlawful and unconstitutional treatment accorded to it is a ground for granting the petition for certiorari and not a basis for denying such petition. It is to the courts that individual citizens must come for protection against the arbitrary action of the executive. Justice and fairness denied in any one case is a denial of justice and fairness to all of us.

Moreover, as has been stated by this Court again and again, the fact that the denial relates to property rather than the person is not a distinction which is not constitutionally protected. The implications of the determination of the New York State Court of Appeals (the Court apparently could not write an opinion) are that if a state can apparently choose to depart in a single instance from the rule of law and deny without advance notice reimbursement for fixed previously approved, long-term real

property costs under the Medicaid, or any other Federally approved Program, no investor or instituional lender can feel secure in putting his capital into a specialized project to carry out a public need. The singling out of any facility for such treatment will surely effect potential investors and lenders and result in a refusal of private new capital to meet the acknowledged health need. If the Medicaid Program is permitted to be a matter of "experimentation" as respondents urge, with principles of reimbursement subject to retroactive adjustments and the property rights of providers trampled upon, such a policy is properly a concern of the courts. If such a policy is in the public interest a potential investor should be warned in advance so that he may judge whether it is in his best interests to make a binding financial commitment to such a Program.

CONCLUSION

Petitioner submits that government is and must be limited by rules, regulations and policy which are applicable to all. Respondents are sworn to uphold the law. They may not ignore their own consistent method of procedure, and their own rules and regulations and apply to the unsuspecting statutory standards never applied before. It is significant that the Court of Appeals of the State of New York presented with all of the many issues, constitutional and otherwise, failed to write an opinion in this case. It was unable to do so. This Court should exercise the power to review such arbitrary and unconstitutional conduct by the executive and provide a forum to redress petitioners' grievances by granting the petition for certiorari.

Dated: New York New York
July 1, 1977

Respectfully submitted,

LOWELL & KARASSIK
Attorney for Petitioner

Stanley H. Lowell
Richard L. Brenner
Of Counsel:

APPENDIX A

§2802. Approval of construction

3. Subject to the provisions of paragraph (b) of subdivision two, the commissioner in approving the construction of a hospital shall take into consideration and be empowered to request information and advice as to (a) the availability of facilities or services such as preadmission, ambulatory or home care services which may serve as alternatives or substitutes for the whole or any part of the proposed hospital construction;

(b) the need for special equipment in view of existing utilization of comparable equipment at the time and place and under the circumstances proposed;

(c) the possible economies and improvements in service to be anticipated from the operation of joint central services including, but not limited to laboratory, research, radiology, pharmacy, laundry and purchasing; and

(d) the adequacy of financial resources and sources of future revenue.